

**DOCKET NO. 453-05-6478.M2
TWCC MR NO. M2-05-1249-01**

—,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
	§	
v.	§	OF
	§	
ACE INSURANCE COMPANY OF	§	
TEXAS ACE USA/ESIS,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

___ (Claimant) requested a hearing to contest an independent review organization (IRO) decision, issued on behalf of the Texas Workers' Compensation Commission (Commission), that a magnetic resonance imaging (MRI) of his right shoulder was medically unnecessary. Ace Insurance Company of Texas Ace USA/ESIS (Ace), the workers' compensation insurance carrier for the Claimant's employer, opposed the request. The Administrative Law Judge (ALJ) concludes the MRI is medically necessary and orders that it be provided.

I. PROCEDURAL HISTORY

A hearing in this case convened on August 8, 2005, before the undersigned ALJ. The Claimant appeared and represented himself, assisted by Commission Ombudsman Juan Mireles. Ace appeared and was represented by Javier Gonzales. The record closed on August 8, 2005. There were no objections to notice or jurisdiction.

II. DISCUSSION

A. Factual and Legal Background

The Claimant suffered a compensable injury on ____, during a meeting in a machine shop at his place of employment. The chair he was sitting in caught in a rail and he fell backwards and injured his right arm, which he used to break the fall and protect his head.

The Claimant had an MRI of his right shoulder in 2001, which revealed a full thickness tear of the supraspinatus, a type III acromion, synovitis in the anterior rotator interval, and chondromalacia of the humeral head/neck junction.¹ On June 20, 2002, Robert Urrea, M.D., performed surgery on the Claimant's right shoulder, including a rotator cuff repair.² Dr. Urrea's operative report said the Claimant's pre-operation problems were quite significant, including severe right shoulder pain and an inability to perform overhead activities because of his pain.³

The Claimant was released to return to work by Dr. Urrea on September 4, 2002. Dr. Urrea said at that time that the Claimant had no right-shoulder complaints.⁴ The Claimant testified he went back to work for a brief period in a supervisory capacity, but has not worked since 2002.

Dr. Urrea's post-September 2002 medical records for the Claimant show:

- On March 3, 2003, his right hand was improving and his right shoulder had excellent range of motion.⁵
- On April 11, 2003, his right shoulder had 175 degrees of abduction and flexion and the greater tuberosity and bicipital tendon are non-tender.⁶

¹ Exs. 2 and 3 at 18.

² Exs. 2 and 3 at 32.

³ *Id.*

⁴ Exs. 2 and 3 at 39.

⁵ Exs. 2 and 3 at 40.

⁶ Exs. 2 and 3 at 41.

- On November 7, 2003, he had right anterior shoulder pain. The record also showed he had been painting.⁷
- On October 25, 2004, he continued to have limited and painful range of motion of his right shoulder.⁸ Dr. Urrea said in this and subsequent records that the Claimant needed an MRI to evaluate his shoulder.
- On November 22, 2004, he had problems with his right hand. There was no report on his shoulder.⁹
- On December 27, 2004, he continued to have right-shoulder pain with all movements that was extremely exacerbated with overhead movement.¹⁰
- On January 17, 2005, he had worsening pain of his right shoulder and inability to do overhead activity because of exacerbated pain.¹¹
- On January 31, 2005, he continued to have right shoulder pain and inability to do any overhead activity because of the pain.¹²
- On February 21, 2005, he continued to have right shoulder pain exacerbated primarily with overhead activities or extended periods of use.¹³
- On March 23, 2005, he continued to have right shoulder pain, with motion of his shoulder above 80 degrees causing sharp pain.¹⁴
- On April 25, 2005, he continued to have chronic right shoulder pain exacerbated by any movement or increased activity.¹⁵
- On May 25, 2005, he continued to have constant right shoulder pain, with some improvement due to the weather.¹⁶
- On June 24, 2005, he was noted to have pain in his right hand, with no comment on his shoulder.¹⁷

⁷ Exs. 2 and 3 at 42. The Claimant testified the painting was at his home rather than at a job.

⁸ Ex. 1 at 13.

⁹ Exs. 2 and 3 at 12.

¹⁰ Ex. 1 at 11.

¹¹ Ex. 1 at 10.

¹² Ex. 1 at 9.

¹³ Ex. 1 at 8.

¹⁴ Ex. 1 at 7.

¹⁵ Ex. 1 at 6.

¹⁶ Ex. 1 at 5.

¹⁷ Ex. 1 at 4.

Ace received Dr. Urrea's request to preauthorize the MRI on January 18, 2005, which it denied based on its observation that the Claimant previously had a right-shoulder MRI that documented a full thickness tear of the subrapinatus and its assertion that there is no evidence of interval changes that would support a change in diagnosis.¹⁸

The Claimant requested reconsideration on February 2, 2005. Ace again denied the request based on its assertions that the record was unclear as to the reasons for the increase in pain and the mechanism of the shoulder pain, the previous types of intervention and outcomes, and whether the Claimant had been compliant in doing home exercises. The reviewer also said the physical exam findings did not appear to be sufficiently significant to warrant the need for an MRI.¹⁹

The Claimant requested medical dispute resolution on March 18, 2005. On April 8, 2005, the IRO issued a decision concluding the MRI was medically unnecessary, based on the following rationale:

Shoulder surgery was performed on 06/20/2002. The most recent physician note provided is from 11/07/2003, which indicated that the patient was working, and had a normal range of motion. The MRI was requested 01/18/05. There is no recent clinical evaluation by the physician to indicate why the test is needed. Medical necessity cannot be determined without adequate clinical information.²⁰

Employees have a right to necessary health care under TEX. LABOR CODE ANN. §§ 408.021 and 401.011. Section 408.021(a) provides, "An employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. The employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the compensable injury; (2) promotes recovery; or (3) enhances the ability of the employee to return to or retain employment." Section 401.011(19) of the Labor Code provides that health care includes "all reasonable and necessary medical . . . services."

¹⁸ Exs. 2 and 3 at 18.

¹⁹ Exs. 2 and 3 at 21.

²⁰ Ex. 1 at 1.

As Petitioner, the Claimant has the burden of proof.²¹

B. Discussion

1. Party Positions

Ace acknowledged at the hearing that the Claimant's shoulder was "problematic," but maintained his present symptoms are unrelated to the compensable injury. It cited Dr. Urrea's June 20, 2002, operative report saying that before the operation he could not perform overhead activity and Dr. Urrea's September 4, 2002, report saying he could return to work and he had normal range of motion. It argued that the surgery corrected the Claimant's problem. It cited favorable reports on the Claimant's shoulder in March and May of 2003 and contrasted these with the November 2003 report saying the Claimant had right shoulder pain. It pointed to the assessments in the November report saying the Claimant had a right rotator cuff tear and right bicep tear. It cited a statement in the November report that the Claimant had been doing painting and the Claimant's testimony that he had been through training in 2004. It argued that the Claimant's problems beginning in late 2003 were the result of causes unrelated to his compensable injury such as painting and training.²²

Ace submitted a motion on August 8, 2005, after the hearing, to introduce into the record a TWCC 21 (now called a PLN 11) form that it filed with the Commission to dispute the extent of the Claimant's injury. It asserted that Dr. Urrea's records show his current condition and need for diagnostic studies are not the direct and natural result of the compensable injury, but rather are from an intervening cause, as shown by Dr. Urrea's records. Ace's motion cited the Commission's rules at 28 TEX. ADMIN. CODE (TAC) §§ 133.307(e)(2)(D) and 133.308(f), which, it asserted, require an IRO decision to be held in abeyance when there is a compensability dispute. It argued there is no time limit for filing a PLN 11 to challenge compensability.

²¹ 1 TEX. ADMIN. CODE (TAC) § 155.41(b); 28 TAC § 148.14(a).

²² Ace did not address whether an underlying shoulder problem might have been exacerbated by such activities as painting and training.

The Claimant acknowledged that the IRO may have made the right decision on the basis of the documents it had before it, but maintained the additional reports it submitted at the hearing clearly demonstrate his pain and that the MRI is necessary. He argued that SOAH has no authority to consider compensability issues and that permitting a PLN 11 filing to abate the case at this point in the process, after an IRO decision has been made and a SOAH hearing completed, would be highly inappropriate and make a mockery of the MRD/SOAH process.

2. Analysis

As indicated above, the ALJ concludes the MRI should be authorized.

The ALJ declines to abate the SOAH proceeding to await a compensability decision based on Ace's PLN 11. Ace is right that neither SOAH nor MRD may decide compensability or extent-of-injury issues; however, both have a statutory responsibility to decide medical necessity disputes. Under the particular circumstances of this case, the ALJ concludes a decision should be issued.

The ALJ is aware of Ace's assertion that it may file an extent-of-injury dispute with the Commission at any time. He is aware that SOAH has no authority to rule on whether or under what circumstances an extent-of-injury filing with the Commission is untimely. However, under Commission Rule § 124.3(e), Ace was required to file an extent-of-injury dispute no later than the earlier of the day it denied the medical bill or the due date for it to pay or deny the medical bill-it did not do so. Moreover, there is no evidence that Ace ever denied the MRI based on the extent-of-injury denial code R. The provisions of the Commission's rules that Ace cited, §§ 133.307(e)(2)(D) and 133.308(f), say a **request** for an IRO shall be abated by a compensability dispute, not that an already-issued IRO decision or a SOAH hearing must be abated.²³

²³ Case law says generally that the express mention of enumeration of one thing, consequence, or class is equal to the express exclusion of all others. *Commission for Lawyer Discipline v. Denisco*, 132 S.W.3rd 211, 216 (Tex. App. B Houston [14th]2004, no writ).

The ALJ concludes, under all the circumstances of this case, including SOAH's responsibility to decide medical necessity disputes, the last-minute, post-hearing filing of the PLN 11, and the fact the Claimant is asking for a procedure to help determine the cause of debilitating pain, that a present decision is appropriate.²⁴

Dr. Urrea's indications for the MRI were persuasive. He said that the procedure was necessary to determine whether there is a right-shoulder internal derangement and to better evaluate the Claimant's continued medical symptoms; that the mechanical screws from the June 2002 operation may be prominent and causing mechanical symptoms; and that just because the Claimant had an MRI in 2001 does not obviate the need for one in 2005.²⁵

The IRO decision expressly said it was based on a lack of medical records after 2003. The post-2003 records were introduced at the hearing.

Ace's assertion that the Claimant's shoulder problems were caused by his painting activities or vocational training was unsupported by any medical expert evidence. Ace's statement that the MRI is unnecessary because the Claimant had a 2001 MRI of his right shoulder and there was no evidence of changes that would support a different diagnosis was effectively countered by the fact of intervening surgery between 2001 and 2005 and by Dr. Urrea's statement that the mechanical screws from the previous surgery could be causing mechanical symptoms and that an MRI was necessary to properly evaluate present symptoms.

²⁴ The ALJ notes that Ace participated in the MRD process and the SOAH hearing. Case law says when there is potential jurisdiction in a case, to permit a party to invoke the exercise of a jurisdiction within the general powers of a court and then to reverse its orders on the ground that it did not have jurisdiction would be to allow the party to trifle with the courts. The principle is one of estoppel in the interest of the sound administration of the laws whereby the regularity or even the validity of an act one has procured cannot be asserted. See *Kirk v. Head*, 152 S.W. 2d 726, 728-729 (Tex. 1941); *Spence et ux. v. State National Bank of El Paso*, 5 S.W. 2d 754, 756 (Tex. 1928); *Strunck v. Peoples*, 576 S.W. 2d 487, 490 (Tex. Civ. App. BWaco 1979, no writ); and *Garza v. Perez*, 403 S.W. 2d 849, 850 (Tex. Civ. App. BCORpus Christi 1966, no writ).

²⁵ Ex. 1 at 9-11.

Ace's other reasons for denying the MRI were also unpersuasive. Again, Dr. Urrea's description of physical symptoms persuasively demonstrate the need for an MRI to determine the reasons for and the mechanism of the Claimant's pain. Previous types of intervention and outcomes, including surgery, had not addressed the pain. Dr. Urrea's statement of the need for an MRI to determine the possibility of internal derangement and whether mechanical screws might be causing pain was more convincing than any purported need to evaluate a home exercise program.

On an overall basis, it is important to stress the fact that the Claimant's request is for an MRI is to determine the cause of pain that has not yet been determined rather than for a course of treatment that is contended to be unnecessary or contraindicated. This does not mean that every request for a diagnostic procedure should receive automatic approval. In this case, however, the Claimant is continuing to have debilitating pain and no other expert has suggested a reason for the pain or how it might be alleviated. The preponderant evidence supports the need for an MRI.

III. FINDINGS OF FACT

1. The Claimant suffered a compensable injury on ____, during a meeting in a machine shop at his place of employment when his chair fell backwards and he injured his right arm, which he used to break the fall and protect his head.
2. The Claimant had magnetic resonance imaging (MRI) of his right shoulder in 2001.
3. The Claimant had severe right shoulder pain and as a result, was unable to perform overhead activities.
4. The Claimant had right shoulder surgery on June 20, 2002.
5. The Claimant had right shoulder pain in November 2003.
6. In December 2004, the Claimant had right-shoulder pain with all movements that was extremely exacerbated with overhead movement.
7. As of January 2005, the Claimant had worsening pain of his right shoulder and an inability to do overhead activity because of exacerbated pain.
8. In February 2005, the Claimant continued to have right shoulder pain exacerbated primarily with overhead activities or extended periods of use.

9. In March 2005, the Claimant continued to have right shoulder pain, with motion of his shoulder above 80 degrees causing sharp pain.
10. In April 2005, the Claimant continued to have chronic right shoulder pain exacerbated by any movement or increased activity.
11. In May 2005, the Claimant continued to have constant right shoulder pain, with some improvement due to the weather.
12. The medical problems causing the Claimant's shoulder pain are not adequately known.
13. The Claimant needs an MRI to evaluate and diagnose his injured right shoulder.
14. The requested MRI is medically necessary.
15. In January 2005, the Claimant's doctor requested that Ace Insurance Company of Texas Ace USA/ESIS (Ace), the workers' compensation insurance carrier for the Claimant's employer, preauthorize an MRI to diagnose the Claimant's right shoulder.
16. Ace denied the Claimant's request.
17. The Claimant requested medical dispute resolution on March 18, 2005.
18. On April 8, 2005, an independent review organization (IRO) concluded the MRI was not medically necessary.
19. On April 25, 2005, the Texas Workers' Compensation Commission (Commission) Chief Clerk of Proceedings received the Claimant's request for a hearing.
20. All parties received adequate notice of not less than 10 days of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
21. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.

IV. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE ANN. § 413.031(k) and TEX. GOV'T. CODE ANN. ch. 2003.
2. Notice of the hearing was proper and timely. TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.

3. The Claimant had the burden of proving that the MRI was medically necessary.
4. The Claimant proved the MRI was medically necessary.
5. The MRI should be preauthorized.

ORDER

IT IS THEREFORE ORDERED that the requested MRI of the Claimant's right shoulder be, and the same is hereby, pre-authorized.²⁶

SIGNED September 2, 2005.

**JAMES W. NORMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

²⁶ The ALJ is aware that a SOAH decision authorizing the MRI could be rendered moot by a Commission Hearings Division decision finding that the Claimant's present symptoms are unrelated to the compensable injury.